JENNER & BLOCK LLP
Kenneth K. Lee (Cal. Bar No. 264296)
klee@jenner.com
Kelly M. Morrison (Cal. Bar No. 255513)
kmorrison@jenner.com
633 West 5th Street, Suite 3600
Los Angeles, CA 90071-2054
Phone: (213) 239-5100
Facsimile: (213) 239-5199

JENNER & BLOCK LLP
Dean N. Panos (admitted *pro hac vice*)
dpanos@jenner.com
353 N. Clark Street
Chicago, IL 60654-3456
Phone: (312) 222-9350
Facsimile: (312) 527-0484

Attorneys for The Hain Celestial Group, Inc.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAMUEL F. ALAMILLA and COLLEEN KING, individually and on behalf of all others similarly situated, Plaintiff, vs. HAIN CELESTIAL GROUP, INC., ZSBPW LLC, and BLUEPRINT WHOLESALE LLC, Defendants.	No. CV 13-05595-YGR **THE HAIN CELESTIAL GROUP, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** [Request for Judicial Notice, Declaration of Jina Wye, and Proposed Order filed concurrently herewith] Hearing Date: June 3, 2014 Time: 2:00 p.m. Courtroom: 5 – 2nd Floor Judge: Hon. Yvonne Gonzalez Rogers Action Filed: December 3, 2013

* * *

PLEASE TAKE NOTICE that, on June 3, 2014, at 2:00 p.m., or as soon thereafter as the Court is available, in Courtroom 5 of the federal courthouse located at 1301 Clay Street, Oakland, California 94612, Defendant The Hain Celestial Group, Inc. ("Hain Celestial") will and hereby does move the Court to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), on the grounds that (1) Plaintiffs' Complaint fails to state a plausible legal claim, (2) Plaintiffs' claims are preempted by federal law, (3) the Court should defer to the FDA under the primary jurisdiction doctrine, (4) Plaintiffs lack standing to seek injunctive relief, and (5) Plaintiffs lack standing to assert claims as to products they never purchased.

Hain Celestial's Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently-filed Request for Judicial Notice and Declaration of Jina Wye, any additional briefing on this subject, and the evidence and arguments that will be presented to the Court at the hearing on this matter.

Dated: April 8, 2014

JENNER & BLOCK LLP

/s Kenneth K. Lee
By: Kenneth K. Lee

Attorneys for The Hain Celestial Group, Inc.

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STATEMENT OF THE ISSUES TO BE DECIDED

This motion raises the following issues:

1. Whether the Complaint's challenge to the terms "unpasteurized" and "raw" fails to state a claim under the False Advertising Law (FAL), Consumer Legal Remedies Act (CLRA), and Unfair Competition Law (UCL) because no reasonable consumer would be misled by these factually true statements.
2. Whether Plaintiffs' state-law claims are preempted because they seek to impose requirements that differ from the federal definition and standards for pasteurization.
3. Whether the Court should defer to the FDA under the primary jurisdiction doctrine on the question of whether a food product subject to high pressure treatment can be described as "raw" and "unpasteurized."
4. Whether the Complaint fails to state a claim under the Magnuson-Moss Warranty Act, a breach of express warranty, or a breach of the implied warranty of merchantability.
5. Whether the Complaint fails to state a claim for "unjust enrichment / common law restitution."
6. Whether Plaintiffs lack standing to seek injunctive relief.
7. Whether Plaintiffs lack standing to assert claims as to products they never purchased.

INTRODUCTION

Hain Celestial makes BluePrintJuice and BluePrintCleanse, organic and cold-pressed juices that do not undergo pasteurization. As any high school science teacher can explain, pasteurization involves subjecting food to high heat to reduce the number of potential pathogens. Milk sold in supermarkets, for example, has been heat pasteurized to make it safer for consumption and extend its shelf-life.

During certain portions of the proposed class period, BluePrint drinks featured one or more of the following truthful statements on the packaging: "Unpasteurized," "100% Raw," and "Raw And Organic." In his original complaint, Plaintiff Samuel Alamilla claimed that those three statements were false because BluePrint drinks are supposedly "nothing more than run-of-the-mill pasteurized juices." But in its Motion to Dismiss, Hain Celestial pointed out that it is undisputed that BluePrint juices are *not* subject to heat pasteurization. It instead relies on a process called High Pressure Processing or High Pressure Pascalization (HPP) that uses pressure, not heat, to combat potential microorganisms in the product. Hain Celestial has been transparent about its use of the HPP process: The packaging for the drinks states that "BluePrint uses pressure instead of heat to keep our beverages fresh, raw and safe." Its website also describes how HPP works, explaining that it uses "high pressure instead of heat to inhibit microflora growth in fresh food" and that this process does not "modify[] the taste in any way," which often happens with pasteurized foods.

Faced with this reality, Plaintiff Alamilla opted not to respond to Hain Celestial's Motion to Dismiss and amended his complaint to assert a slightly revamped theory. The First Amended Complaint (FAC) now essentially concedes that the challenged statements are factually true and that BluePrint juices are in fact not pasteurized. Nonetheless, Plaintiff Alamilla, along with a newly found plaintiff, claims that the statements are misleading from the perspective of "raw food movement" followers because their understanding of the terms "raw" and "unpasteurized" differs from that of a typical reasonable consumer. According to Plaintiffs, "raw foodists" believe that "unpasteurized" does not mean what it says (*i.e.*, not pasteurized); rather, they say it means that the product was completely untreated whatsoever for the removal of bacteria and therefore has the exact same amount of vitamins, live enzymes, and other nutrients found in untreated juices.

Plaintiffs' lawsuit must be dismissed for the following reasons:

First, the three challenged statements are not likely to deceive a reasonable consumer. Reasonable consumers understand that pasteurization is a form of heat treatment, and they similarly interpret "raw" to mean uncooked. It is beyond dispute that BluePrint drinks are never cooked or subjected to heat pasteurization. Plaintiffs resort to relying on idiosyncratic and subjective definitions of "unpasteurized" and "raw" held by "raw food movement" devotees, such as Plaintiffs. But the objective, reasonable person standard is the touchstone for determining whether a statement is deceptive. And here, a reasonable consumer understands the term "unpasteurized" to mean just that — the food has not been pasteurized. In analogous food labeling cases, federal district courts in the Ninth Circuit have repeatedly held that the reasonable consumer standard applies, not the subjective or extreme views of a particular plaintiff or subgroup.

Even if this Court adopted the unorthodox views of "raw foodists," Plaintiffs' claims still fail. Plaintiffs allege that members of the "raw food movement" diligently seek out "unprocessed, uncooked, and not decontaminated" foods that have "a shelf life of five days or less." It simply is not plausible that these highly sophisticated individuals would be deceived into believing that packaged BluePrint products that, according to Plaintiffs, have a shelf-life of over a month and are sold at mass retailers are exactly the same as completely untreated juices that perish within days and are sold at specialty juice bars. Indeed, federal law states that (for health reasons) completely untreated juices can be sold *only* at specialty vendors that "store, prepare, package, serve, *and* vend their products exclusively and directly to consumers." Further, federal law requires that untreated juices bear a prominent "**WARNING**" label stating that it "may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems." BluePrint products do not bear this warning label because they are subjected to HPP, a process that has been approved by the federal government as reducing harmful pathogens. The packaging of untreated juices also discloses their "shelf life of five days or less," while BluePrint packaging discloses that the products have a substantially longer shelf life. In short, it is implausible that a "raw foodist" would confuse BluePrint products with completely untreated juices.

Second, Plaintiffs' claims are preempted under federal law because the FDA has issued regulations defining pasteurization as a form of processing using heat and has set rules regarding when a product can be described as "pasteurized." The FDA has also issued detailed guidelines regarding juice processing, which expressly allow (and define) HPP as a distinct alternative to pasteurization. Plaintiffs' state-law claims essentially attempt to upend the federal standard for pasteurization by arguing that, contrary to federal rules and guidelines, Hain Celestial cannot describe a non-pasteurized food product as "unpasteurized."

Third, this Court has the option of deferring this issue to the FDA under the primary jurisdiction doctrine. The FDA has issued regulations and guidelines relating to both pasteurization and HPP, as well as the specific use of these processes for juice products. At the very least, the FDA has the expertise and is better suited to determine on a uniform basis whether HPP-treated juice can be described as "raw" and "unpasteurized."

Finally, Plaintiffs' various warranty and unjust enrichment claims must be dismissed because they have not properly alleged all of the requisite elements, and Plaintiffs lack standing to assert claims for products they did not purchase, such as the BluePrintCleanse products.

BRIEF PROCEDURAL AND FACTUAL BACKGROUND

I. Procedural History.

On October 15, 2013, Plaintiffs' counsel filed a putative class action styled *Stark v. Hain Celestial Group, Inc.* in the Southern District of New York. Complaint, No. 13-7246, ECF No. 1 (Oct. 15, 2013). That action was premised on the same theory as this case and was assigned to Judge Denise Cote. *See id.* Plaintiffs' counsel shortly thereafter voluntarily dismissed the New York action. Notice of Voluntary Dismissal, No. 13-7246, ECF No. 6 (Dec. 9, 2013).

Just before dismissing the New York case, Plaintiffs' counsel filed this suit on behalf of Plaintiff Samuel Alamilla. ECF No. 1 (Dec. 3, 2013). Notably, Plaintiff Alamilla alleges that on November 15, 2013 — mere weeks before his attorney filed this suit and dismissed the *Stark* case — he purchased a single bottle of BluePrint "Red Juice" "from a store in Sonoma County." ECF No. 31 ("FAC") ¶ 12. Notably, the single "Red Juice" product he purchased did *not* contain the word "unpasteurized" on the packaging. *See id.*; Ex. C; Wye Decl. ¶ 5.[1]

When Hain Celestial in its motion to dismiss pointed out that this fact barred Plaintiff Alamilla from representing a class of individuals alleging they were misled by the word "unpasteurized," (ECF No. 26 at 19-20), his counsel filed an amended complaint adding a second plaintiff, Colleen King. Plaintiff King alleges that she purchased a single bottle of "Gold Juice" on April 16, 2013 "from a store in Los Angeles County," and that the package described the product as "unpasteurized." FAC ¶ 13.

II. The BluePrint Products.

Hain Celestial, which acquired BluePrint in December 2012, makes beverages loaded with organic fruits and vegetables. For example, one bottle of its "Green Juice" contains "6 lbs. of leafy produce" and a bottle of "Red Juice," which is made with organic apples, carrots, beets, lemon and ginger, contains 220% Daily Value of Vitamin A and 70% Daily Value of Vitamin C. FAC ¶ 28; Ex. C. BluePrint makes these beverages without relying on the traditional pasteurization method of "boil and bottle" to reduce potential bacteria in foods. *See* FAC ¶¶ 14, 25. Hain Celestial instead relies on a process called High Pressure Pascalization (HPP) to kill potential microorganisms in the drinks. *See id.* ¶¶ 1, 25.

Perhaps the best summary of the differences between pasteurization and HPP comes from an academic book cited by Plaintiffs in their complaint. *See* Ex. G, Eamonn Hogan, et al., *High Pressure Processing of Foods: An Overview*, *in* EMERGING TECHNOLOGIES FOR FOOD PROCESSING (Da-Wen Sun, ed., 2005) (cited in FAC at pp. 7-8, nn.5, 7).[2] The authors acknowledge that "heating food [via pasteurization] effectively reduces levels of microorganisms such as bacteria," but "such processing can alter the natural taste and flavor of food and destroy vitamins." *Id.* at 4. Accordingly, researchers have sought out "innovative non-thermal processes" that can provide "safe, fresher-tasting, nutritive foods without the use of heat or chemical preservatives." *Id.* And the leading "innovative non-thermal process" is the use of high pressure. As the authors point out, "HP [high pressure] technology potentially answers many, if not all, of the[] challenges" of "how to keep the food fresh and healthy with high retention of vitamin and nutrient levels, while offering a reasonable shelf-life and convenience and assuring food safety." *Id.* They, therefore, conclude that "[u]nlike heat treatment, HP treatment does not reduce the quality of foods" and "can thus facilitate the production of foods that have the quality of fresh foods." *Id.*[3]

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[1] Exhibits A-F are attached to the concurrently-filed Declaration of Jina Wye and Exhibits G-L are attached to Hain Celestial's Request for Judicial Notice.

[2] The Court can consider this publication under the incorporation-by-reference doctrine because Plaintiffs have cited and relied upon it in the FAC. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

Hain Celestial has been open about the fact that it does not pasteurize its beverages and has explained the benefits of HPP. Since September 2012, the BluePrintJuice labels have stated that "BluePrint uses pressure instead of heat to keep our beverages fresh, raw and safe." Exs. B, C. BluePrint's website — which Plaintiffs allege they read prior to purchasing BluePrintJuice (FAC ¶¶ 12, 13) — further explains that "[u]nlike traditional heat pasteurization . . . Pascalization is an external process: The pressure is applied when products are in their final packaging, thus eliminating the possibility of recontamination." *See* Ex. H, BluePrint and Harmless Harvest Put Pressure on the Raw Beverage Industry: High Pressure Pascalization Applied to Raw Juice and Coconut Water, *available at* blueprintjuice.com/hpp (last visited Apr. 3, 2014) (cited in FAC at 7 n.4). The website further notes that HPP "safely deliver[s] the nutrition of raw ingredients without modifying the taste in any way." *Id.*

III. Plaintiffs' Allegations.

Plaintiff Alamilla alleges that he is a "health-conscious consumer" who purchased a single bottle of "Red Juice" from a "grocery store" in November 2013. FAC ¶ 12. He alleges that the

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[3] Plaintiffs selectively quote from *High Pressure Processing of Foods* and claim the book states that HPP may remove nutrients from the food. *See* FAC ¶ 24. In reality, the book was not referring to nutritional content, but rather "detrimental changes in food quality that could affect the appearance of and texture of food." Ex. G at 16. Further, the book does not say that HPP will cause "potential detrimental changes in food quality that could affect the appearance of and texture of food," but rather notes that it is possible that "*higher pressures may*" cause "detrimental changes in food quality that could affect the appearance of and texture of food." *Id.* (emphasis added). The authors ultimately conclude that "HP processing offers the food industry a technology that can achieve the food safety properties of heat-treated foods while meeting consumer demand for fresher-tasting foods." *Id.*

"container he purchased represented" that the product was "100% Raw" and "Raw And Organic," and that he interpreted these statements to mean that the juice "contained the same vitamins, nutrients, live enzymes, nutritional value, and health benefits that are otherwise destroyed in the course of 'cooking' juice." *Id.*[4] He further claims that, although HPP does not use heat, treating the "Red Juice" with pressure rendered it "equivalent to a cooked juice." *Id.*

Plaintiff King alleges that she is a "health-conscious consumer" who purchased a single bottle of "Gold Juice" from a "grocery store" in April 2013. FAC ¶ 13. She alleges that the "container she purchased represented" that the product was "100% Raw," "Raw And Organic," and "Unpasteurized" and that she interpreted these statements to mean the juice "contained the same vitamins, nutrients, live enzymes, nutritional value, and health benefits that are otherwise destroyed in the course of conventional pasteurization." *Id.* She also claims that although HPP does not use heat, treating the "Gold Juice" with pressure made it "equivalent to pasteurized or cooked juice." *Id.*

IV. Federal Regulations and Guidance on Pasteurized Juices and Non-Treated Drinks.

Plaintiffs claim they were duped by the terms "raw" and "unpasteurized" into believing the BluePrint products were identical to untreated juices with "a shelf life of five days or less." FAC ¶ 20; *see also id.* ¶ 2 (alleging untreated juices "must be consumed within days of their production").

The federal government has issued extensive regulations and guidelines for bottled juices that are found on the shelves of supermarkets as well as for untreated juices sold at specialty juice bars. *See* 21 C.F.R. §§ 120.1-120.25. Pursuant to FDA regulations, *all* juice products that are sold through grocery stores — such as the stores where Plaintiffs bought BluePrintJuice — *must* comply with the FDA's Juice HAACP Regulation for health safety reasons. That regulation mandates that juices sold at mass retailers must be subjected to some form of treatment, whether it be pasteurization, HPP, or UV treatment, to reduce potentially harmful pathogens in the juices. *See id.*; Ex. J, FDA, *Guidance for Industry: The Juice HACCP Regulation - Questions & Answers* at Q1 (Aug. 31, 2001). The sole exception to the HAACP Regulation is for a "retail establishment" that

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[4] The package purchased by Plaintiff Alamilla did not include the term "unpasteurized," which was included on BluePrintJuice labels only from September 2012 to April 2013. *See* Wye Decl. ¶ 4.

"stores, prepares, packages, serves, *and* vends its product exclusively and directly to consumers" and does not "sell[] or distribute[] juice to [any] other business entities," such as grocery stores or other retailers. 21 C.F.R. §§ 120.3(l); 21 C.F.R. § 101.17(g); Ex. J at Q15-17; Ex. K, FDA, *Guidance for Industry: Juice HACCP Hazards and Controls Guidance First Edition; Final Guidance* § III(D)(1.0) (Mar. 3, 2004).

Further, federal law requires untreated juices sold by these specialty stores to bear the following statement:

> **WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems.**

21 C.F.R. § 101.17(g); Ex. K § III(D)(1.0).

In contrast, BluePrint juices are not made and sold at specialty juice bars. They are made and processed at a facility and then shipped to various mass retailers, where customers can buy these bottled drinks from the shelves. The BluePrint bottles also make clear that their shelf-life is approximately a month. *See* FAC ¶ 21. And because BluePrint juices have been treated through HPP to reduce pathogens, they are not required to have the prominent warning label.

LEGAL STANDARDS

Under the Supreme Court's heightened plausibility standard for pleading, a complaint must contain more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" to survive dismissal. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint must allege sufficient facts to "state a claim to relief that is plausible on its face." *Id.* (quoting *Twombly*, 550 U.S. at 570). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

The Ninth Circuit has stated that district courts should apply "common sense" in resolving false advertising complaints at the pleading stage. *See Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x 113, 115 (9th Cir. 2012) (dismissing UCL false advertising complaint where theory of the case "strain[ed] credulity"); *Stuart v. Cadbury Adams USA, LLC*, 458 F. App'x 689, 690-91 (9th Cir. 2011) (same). Accordingly, federal courts in the Ninth Circuit routinely dismiss false advertising claims pursuant to Rule 12(b)(6).[5]

ARGUMENT

I. The Complaint Must Be Dismissed Because "Unpasteurized," "100% Raw," and "Raw and Organic" Are Factually True and Not Likely to Deceive.

A. The Challenged Statements Are Not Likely to Deceive a Reasonable Consumer.

To state a claim for false advertising under the FAL, CLRA, or UCL, Plaintiff must plausibly allege that Hain Celestial made statements likely to deceive a reasonable consumer. *See Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995). "A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances.'" *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012). Moreover, "'[l]ikely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). Rather, the advertisement must be "such that *it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.*" *Id.* (emphasis added). Further, whether a representation is "likely to deceive" a reasonable consumer is evaluated in the context of the label as a whole, not on the basis of "a single out-of-context phrase found in one component of [a product's] label." *Hairston v. S. Beach Beverage Co.*, No. 12-1429, 2012 WL 1893818, at *4 (C.D. Cal. May 18, 2012); *see Freeman*, 68 F.3d at 290. And on a Rule 12(b)(6) motion, courts should apply their "judicial experience and common sense" in testing the plausibility of the plaintiff's theory. *Manchouck*, 2013 WL 5400285, at *2 (quoting

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[5] *See, e.g.*, *Manchouck v. Mondelez Int'l Inc.*, No. 13-2148, 2013 WL 5400285, at *3 (N.D. Cal. Sept. 26, 2013) (dismissing complaint where plaintiff's allegations that she was misled by Newtons cookies label "strain[ed] credibility"); *Videtto v. Kellogg USA*, No. 08-1324, 2009 WL 1439086, at *2-3 (E.D. Cal. May 21, 2009) (dismissing lawsuit alleging that images of fruits on fruit-flavored cereal misleadingly suggested that the cereal contained real fruit); *Sugawara v. Pepsico, Inc.*, No. 08-1335, 2009 WL 1439115, at *2-4 (E.D. Cal. May 21, 2009) (dismissing UCL, FAL, and CLRA claims challenging representations and images on Cap'n Crunch packaging where such representations were unlikely to deceive a reasonable consumer); *McKinniss v. Sunny Delight Beverages Co.*, No. 07-2034, 2007 WL 4766525, at *4-5 (C.D. Cal. Sept. 4, 2007) ("[D]epictions of various fruit on Defendant's product labels are simply not deceptive as a matter of law" because a reasonable consumer understands that SunnyD is merely a fruit-flavored drink and "can readily and accurately determine the composition and nutritional value of a product.").

Iqbal, 556 U.S. at 679).

Plaintiffs here have failed to state a claim because it simply is not plausible that "a significant portion" of the general public "acting reasonably" would be deceived by the terms "unpasteurized," "100% raw," and "raw and organic" found on some BluePrint packaging. It is undisputed that BluePrint beverages are made from organic fruits and vegetables and are not pasteurized. Reasonable consumers understand that "pasteurization" is "a process in which a liquid . . . is *heated*" to make it safe for consumption, and that "raw" means "not cooked." *See, e.g.*, Merriam-Webster Dictionary (emphasis added) (defining "pasteurization" as "a process in which a liquid (such as milk or cream) is heated to a temperature that kills harmful germs and then cooled quickly."); *see also Brod v. Sioux Honey Ass'n, Coop.*, 927 F. Supp. 2d 811, 829, 831 (N.D. Cal. 2013) (relying on dictionary definition in assessing reasonable consumer standard). Indeed, even schoolchildren are familiar with the concept of pasteurization because their milk cartons state that they are "Grade A Pasteurized." And in case the consumer does not understand the term "unpasteurized," the BluePrint bottles explicitly disclose that "BluePrint uses pressure instead of heat to keep our beverages fresh, raw, and safe." FAC ¶ 28. A reasonable consumer reading a BluePrint label would therefore understand the term "unpasteurized" to mean just what it says — the BluePrint beverages are not pasteurized but rather are treated with high pressure. Likewise, a reasonable consumer would understand "raw" to mean "uncooked" (*i.e.*, not heated), consistent with normal understanding of that word. *See, e.g.*, Merriam-Webster Dictionary (defining "raw" as "not cooked"); *see also Manchouck*, 2013 WL 5400285, at *3 (considering dictionary definition in evaluating claim under the reasonable consumer standard). And the packaging further makes clear that the term "raw" as used on the label is not synonymous with "completely untreated": It says "BluePrint uses *pressure instead of heat* to keep our beverages fresh, *raw*, and safe." FAC ¶ 3 (emphasis added).

Nonetheless, Plaintiffs insist that these terms are deceptive, and ascribe to them their own idiosyncratic conception of what they should mean. For instance, they insist that Hain Celestial cannot use the terms "unpasteurized" or "raw" — even though its BluePrint products are *not* pasteurized or cooked with heat — unless they are identical to fresh-squeezed juices that have not been treated in any way to remove bacteria. *See* FAC ¶ 4. In other words, they maintain that it is not enough that an "unpasteurized" juice not be pasteurized; the juice must be identical before and after the HPP process because that is what "raw foodists" supposedly believe.

But the extreme views of "raw food movement" followers are not relevant in determining whether a statement is deceptive. *See Brod*, 927 F. Supp. 2d at 828. While there is a narrow exception to the reasonable consumer standard where an "advertisement targets a particular disadvantaged or vulnerable group," *Lavie*, 105 Cal. App. 4th at 508,[6] Plaintiffs allege the opposite. According to Plaintiffs, members of the "raw food movement" are highly sophisticated individuals with detailed knowledge of "living enzymes, probiotics, and nutrients" and the effect that consumption of these ingredients has on their "digestive system and arteries." FAC ¶¶ 18, 19.

Federal courts in the Ninth Circuit have rejected similar arguments made by plaintiffs in the recent raft of "honey" mislabeling litigation and held that the reasonable consumer, not an idiosyncratic subgroup, sets the standard for assessing claims of deception. The plaintiffs in those cases alleged that "honey" products were inaccurately labeled because the bee pollen (which they insisted has health benefits) had been filtered out of the products during the manufacturing process, and that the food companies should have disclosed this fact to consumers. *See, e.g.*, *Brod*, 927 F. Supp. 2d at 814, 827; *Cardona v. Target Corp.*, No. 12-1148, 2013 WL 1181963, at *1 (C.D. Cal. Mar. 20, 2013). This theory was repeatedly rejected at the pleading stage.

For example, the *Brod* court explained that it was irrelevant "that a particularly sophisticated consumer might consider pollen to be a valuable component of honey, such that the non-disclosure of its removal from Sue Bee Honey would likely result in deception to him or her" because this "does not establish that a *reasonable* consumer would expect honey to contain pollen." 927 F. Supp. 2d at 828 (concluding failure to disclose the removal of pollen is not material to the "ordinary consumer"); *see also Ross v. Sioux Honey Ass'n. Co-op.*, No. 12-1645, 2013 WL 146367, at *16-18 (N.D. Cal. Jan. 14, 2013) (same). And in *Cardona*, the court concluded the plaintiff could not satisfy the reasonable consumer test because she could not "plausibly allege a *widespread consumer*

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[6] *See also Manchouck*, 2013 WL 5400285, at *2 ("Unless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer.").

expectation or understanding that 'honey' means 'honey with pollen' because she has made no showing that demand for honey with pollen is anything but a relatively recent phenomenon." 2013 WL 1181963, at *10 (emphasis added); *see also Hill v. Roll Int'l*, 195 Cal. App. 4th 1295, 1303-04 (2011) (declining to assess the plaintiff's claims based on her views as consumer involved in the "green" movement because they did not "satisfy the reasonable consumer standard").

Similarly here, the "raw food movement" followers' idiosyncratic and absolutist view of "unpasteurized" and "100% raw" is not consistent with the reasonable consumer's understanding of those terms. Plaintiffs concede that "[r]aw foodism is a relatively new diet movement." FAC ¶ 18. And while a "particularly sophisticated consumer" involved in the raw food movement might agree with Plaintiffs' definitions of "unpasteurized" and "100% raw," ordinary consumers would not. *See Brod*, 927 F. Supp. 2d at 828. Instead of believing that "unpasteurized" or "raw" means that literally nothing has changed in the HPP-processed drinks, a reasonable consumer would expect that a juice product labeled as "unpasteurized" or "raw" means that the juice was not pasteurized or cooked with heat — *not* that it was not treated with pressure, as disclosed on the packaging. *See Cardona*, 2013 WL 1181963, at *10; *Brod*, 927 F. Supp. 2d at 828; *see also Davis*, 691 F.3d at 1162, 1169 ("[a] representation does not become 'false and misleading' [under the FAL and UCL] merely because it will be unreasonably misunderstood by an . . . unrepresentative segment" of consumers).

Moreover, Plaintiffs' absolutist view that an "unpasteurized" or "raw" drink has to be "identical" in every aspect pre-and post-HPP treatment is at odds with common sense. As Plaintiffs acknowledge, BluePrint drinks have a "shelf-life of about 30 days," not the "five days or less" for drinks that have not been treated in any way and are therefore "extremely vulnerable to spoliation and degradation." FAC ¶¶ 20-22. A reasonable consumer understands that packaged foods and drinks found on the shelves of supermarkets undergo some processing to make them safe for consumption and to extend shelf life, and that such products may not be completely identical in every aspect as they were prior to processing. In other words, it is a "well-known fact of life" that packaged drinks sold on supermarket shelves are subject to some processing, and it would therefore be a "suspension of logic" that defies our "collective experience" to think otherwise. *See Williamson v. Apple, Inc.*, No. 11-377, 2012 WL 3835104, at *6 (N.D. Cal. Sept. 4, 2012) (dismissing case challenging cracked iPhone glass, despite Apple's statement that its glass was made from extra-durable glass used in helicopters and bullet trains).

Federal courts in California have repeatedly applied common sense in dismissing lawsuits challenging the labeling of packaged foods in analogous contexts. For example, the plaintiff in *Rooney v. Cumberland Packing Corp.* alleged that consumers would be misled by the phrase "Sugar in the Raw" into believing "the product was raw, unprocessed, and unrefined." No. 12-33, 2012 WL 1512106, at *4 (S.D. Cal. Apr. 16, 2012). But the court held that no reasonable consumer could be deceived in this manner because "[n]owhere on the box d[id] the words 'unprocessed' or 'unrefined' appear"; to the contrary, the label clearly disclosed that the product was "turbinado sugar," a processed sugar. *Id.* Likewise here, not only does the BluePrint label *not* state that the product is "unprocessed," "not preserved," "not decontaminated," or not subject to pressure treatment, it *explicitly discloses* that "BluePrint uses pressure instead of heat to keep our beverages fresh, raw, and safe." FAC ¶ 3.[7]

B. The BluePrint Labels Are Also Not Likely to Deceive a "Raw Foodist."

Even if this Court were to assess this lawsuit from the eyes of a "raw food" devotee instead of an ordinary consumer, it still must be dismissed because "raw foodists" would not be deceived by the BluePrint labels. Plaintiffs allege that members of the "raw food movement" are highly-sophisticated individuals for whom consumption of "unprocessed, uncooked, and not decontaminated" foods is "vital." FAC ¶¶ 18-20. Plaintiffs further allege that these individuals are informed as to the effects of "processing" and understand that "pasteurization preserves and sterilizes foods and juices by substantially reducing the live, active enzymes that are the essence of raw foods." *Id.* ¶¶ 19, 20. They accordingly "focus[] on the consumption of foods with living enzymes, probiotics, and nutrients" and seek out foods with "a shelf life of five days or less." *Id.* These highly sophisticated individuals would not be deceived into believing that the BluePrint drinks are not treated in any way to combat potential pathogens.

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[7] *See also, e.g.*, *Pelayo v. Nestle USA, Inc.*, No. 13-5213, 2013 WL 5764644, at *4 (C.D. Cal. Oct. 25, 2013) (dismissing claim alleging "all natural" label on packaged pasta was deceptive because "the reasonable consumer is aware that Buitoni pastas are not 'springing fully-formed from Ravioli trees and Tortellini bushes'"); *Red v. Kraft Foods, Inc.*, No. 10-1028, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012) ("the product is a box of crackers, and a reasonable consumer will be familiar with the fact of life that a cracker is not composed of primarily fresh vegetables"); *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 892 n.38 (C.D. Cal. 2013) (holding that reasonable consumers understand that a soda labeled "diet" contains artificial sweeteners).

First, the untreated juices that "raw foodists" are willing to consume can be purchased only at a juice bar that "stores, prepares, packages, serves, *and* vends its product exclusively and directly to consumers." *See* Ex. J at Q17. In fact, it would be a violation of federal law to sell these products through an indirect retailer like the grocery stores where Plaintiffs bought BluePrintJuice. *See* Ex. K at III(A); FAC ¶¶ 12, 13. Surely, "raw foodists" — for whom it is "vital" to consume "foods that are unprocessed, uncooked, and not decontaminated" (FAC ¶¶ 18-20) — would know that highly perishable untreated drinks are not sold on the shelves of mass retailer supermarkets.

Second, federal law requires that untreated juice packages bear a prominent "**WARNING**" label that the "product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems." 21 C.F.R. § 101.17(g). BluePrint products do not bear this label because they are subjected to HPP, a process that has been approved by the federal government as reducing harmful pathogens. *See* Exs. A-F. Again, it is difficult to believe that someone for whom it is "vital" to consume untreated juices would not be accustomed to looking to this warning label for confirmation that the juice products they are purchasing have not been treated to reduce bacteria.

Third, as Plaintiffs allege, the packaging of untreated juices discloses their "shelf life of five days or less," while BluePrint packaging states that the products have a substantially longer shelf life of approximately 30 days. FAC ¶¶ 20, 21. A dedicated "raw foodist" would certainly know that the shelf-life of a product is a clear indication of whether it is "unprocessed, uncooked, and not decontaminated" and that the BluePrint products are therefore not the wholly untreated products that, allegedly, are the hallmark of the "raw food movement."

Finally, the BluePrint labels explicitly disclose that "BluePrint uses *pressure instead of heat* to keep our beverages fresh, *raw* and *safe*." FAC ¶ 28 (emphasis added). Again, it is implausible that a consumer who is dedicated to consuming foods that are "unprocessed" and "not decontaminated" would not understand this statement — combined with the three facts above — to indicate that the beverages have been subject to pressure-treatment to render them "safe" for consumption over a period of weeks. These savvy consumers would not construe "unpasteurized" or "raw" as "completely untreated" when the label expressly states that BluePrint products are in fact treated with pressure to make them "safe."

In sum, it is not at all "likely" that a "raw foodist" reviewing the BluePrint labels "as a whole" would be deceived into believing that the BluePrint products are entirely untreated, unprocessed, and "not decontaminated." *See Freeman*, 68 F.3d at 290; *Hairston*, 2012 WL 1893818, at *4 (whether an representation is "likely to deceive" is evaluated in the context of the label as a whole, not on the basis of "a single out-of-context phrase found in one component of [a product's] label"). Accordingly, Plaintiffs' claims must be dismissed regardless of the "reasonable consumer" standard that is applied.

II. The State-Law Claims Are Preempted Because They Seek to Impose Requirements That Differ From the Federal Definition of and Standard for Pasteurization.

Congress and the FDA have consistently enacted rules and guidelines that establish a national uniform food-labeling standard. The Nutrition Labeling and Education Act (NLEA), for example, features a broad express preemption provision that is intended to avoid a patchwork quilt of conflicting state-law labeling standards. 21 U.S.C. § 343-1(a); *Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 106-09 (D.D.C. 2006) (noting the expansive scope of the NLEA preemption clause). The NLEA provides that "*no State* or political subdivision of a State *may directly or indirectly establish . . . any requirement for . . . labeling of food . . . that is not identical* to the requirement[s]" set forth in the NLEA. 21 U.S.C. § 343-1(a) (emphasis added). In other words, states cannot impose their own unique labeling standards that go "beyond, or [are] different from" the federal labeling standards that Congress has established. *In re Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig.*, 588 F. Supp. 2d 527, 532 (S.D.N.Y. 2008).[8]

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[8] *See also Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 427 (7th Cir. 2011) ("Even if the disclaimers that the plaintiff wants added would be consistent with the requirements imposed by the [FDCA], consistency is not the test [for NLEA preemption]; identity is."); *Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d 1111, 1118 (C.D. Cal. 2010) ("[c]onsumer protection laws, such as the UCL, FAL, and CLRA are . . . preempted if they seek to impose requirements that contravene the requirements

(Continued…)

Even informal FDA policies can preempt state-law claims that impose additional or different conditions than the federal policy. *See, e.g.*, *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 1002 (2d Cir. 1985) (USDA's definition of "imitation" is given preemptive effect "[e]ven if it [is] . . . a statement of general policy"). For example, in *Reid v. Johnson & Johnson*, the Southern District of California dismissed the plaintiff's claim as preempted because the product's "labeling [wa]s in compliance with the requirement of [a] 2003 FDA letter" "reflect[ing] the FDA's position" on health claims concerning plant stanol esters. No. 11-1310, 2012 WL 4108114, at *8 (S.D. Cal. Sept. 18, 2012); *see also Degelmann v. Advanced Med. Optics, Inc.*, 659 F.3d 835, 841-42 (9th Cir. 2011) (ruling that informal FDA guidance can preempt state-law claims and finding UCL claims preempted by guidance, even though the guidance "does not create or confer any rights for or on any person, and does not operate to bind FDA or the public"), *vacated pursuant to settlement*, 699 F.3d 1103 (9th Cir. 2012).

Here, Plaintiffs' claims are preempted because they conflict with the federal definition and standard for "pasteurization." Plaintiffs argue that describing BluePrint products as "unpasteurized" and "raw" is improper because the BluePrint beverages undergo HPP, which they claim is akin to pasteurization. *See, e.g.*, FAC ¶¶ 4, 25. But FDA regulations explicitly define pasteurization as a particular form of processing that involves treatment *by heat*. For example, to qualify as pasteurized under FDA regulations, orange juice must be "so treated *by heat* as to reduce substantially the enzymatic activity and the number of viable microorganisms." 21 C.F.R § 146.140 (emphasis added). Similarly, the FDA rule on mandatory pasteurization of milk defines the terms "'pasteurization,' 'pasteurized,' and similar terms" to mean "the process of *heating every particle* of milk and milk product in properly designed and operated equipment" to a required temperature. 21 C.F.R. § 1240.61 (emphasis added); *see also Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 318 (2d Cir. 1982) ("Pasteurization entails heating the juice to approximately 200° Fahrenheit to kill certain natural enzymes and microorganisms which cause spoilage."), *superseded by statute on other grounds as stated in Johnson & Johnson v. GAC Int'l, Inc.*, 862 F.2d 975, 978 (2d Cir.

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set forth by federal law.").

1988); *Veal v. Citrus World, Inc.*, No. 12-801, 2013 WL 120761, at *8 (N.D. Ala. Jan. 8, 2013) ("by its very definition, pasteurized orange juice is orange juice [] that has been processed and treated with heat. . . .").

Through industry guidelines, the FDA has made clear that this same heating requirement applies to pasteurization of juice products generally. FDA guidelines on juice processing define pasteurization as "a *heat treatment* sufficient to destroy pathogens," and clarify that "to be labeled as 'pasteurized,' a juice *must be heat treated* to destroy pathogens." Ex. J at 62, 64 (emphases added). The FDA also recognizes that juice manufacturers may comply with safety regulations through treatments other than pasteurization, such as the use of "high pressure." *See id.* at 37 ("*How can I achieve a 5-log reduction without pasteurizing the product?* . . . You can use . . . high pressure . . ."). The FDA treats these alternative processes as separate and distinct *alternatives* to pasteurization — not as two sides of the same coin, as Plaintiffs would have it. Indeed, the FDA has stated that it would be "misleading" to label a juice product that was treated with UV light — a process that, like pasteurization and HPP, controls pathogens and bacteria — as "pasteurized" because pasteurization is a particular type of "*heat treatment*" that destroys pathogens, not merely any treatment that results in the control of pathogens. *Id.* at 64 (emphasis added).

Under the federal definition of "pasteurization," it is clear that BluePrint beverages are not pasteurized and therefore can be described as "unpasteurized." Under Plaintiffs' theory, however, a manufacturer would be prohibited under state law from making a representation that a juice product is "unpasteurized" or "raw" if it undergoes *any* process that affects its "vitamins, nutrients, live enzymes, nutritional value, and health benefits," even though the FDA has defined pasteurization narrowly so as to include heat treatment only. *See id.* at 62, 64.

In other words, Plaintiffs' claim fails because the BluePrint drinks *are*, in fact, not pasteurized according to FDA rules, regulations, and guidelines. *Cf. Veal*, 2013 WL 120761, at *8 (dismissing complaint where the plaintiff "purchased a product labeled as pasturized [sic] orange juice and now complains that it was pasturized [sic] and not what he believed he was buying"). Further, BluePrint beverages are accurately described as having been treated with HPP, a process that the FDA recognizes as an alternative to pasteurization. *See, e.g.*, Ex. J at 37, 64; Ex. K §§ 5.2, 5.33 (discussing "Validated Pasteurization Treatments for Juice" and "High Pressure Processing Systems" as alternative means of complying with the juice HAACP regulation); *see also* Ex. L, FDA, *Guidance for Industry: Letter to State Regulatory Agencies and Firms That Produce Treated (but not Pasteurized) and Untreated Juice and Cider* (Sept. 22, 2005) (noting that juice can be "treated" but "not pasteurized" and discussing pasteurization as an "alternate process" to be used in the event that another form of treatment is insufficient).[9]

III. The Court Should Defer to the FDA Under the Primary Jurisdiction Doctrine.

In the alternative, Plaintiffs' claims should be stayed or dismissed under the primary jurisdiction doctrine so that the FDA may decide whether beverages that undergo HPP treatment can be described as "raw" and "unpasteurized."

In order to promote the "proper relationships between the courts and administrative agencies charged with particular regulatory duties," the primary jurisdiction doctrine applies where enforcement of a claim "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). Deferral to an agency is appropriate where it has been "vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1363 (9th Cir. 1987). Courts traditionally weigh four factors in deciding whether to apply the primary jurisdiction doctrine: "(1) [the] need to resolve an issue that

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[9] The claim challenging the term "raw" is preempted for the same reason. The FDA has used the terms "raw" and "unpasteurized" interchangeably to refer to products that have not been heat treated. As the FDA explains in its resources for consumers, "[r]aw milk is milk . . . that has not been pasteurized to kill harmful bacteria. . . . Pasteurization is a process that kills harmful bacteria by heating milk to a specific temperature for a set period of time." Ex. H, FDA, The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk (Aug. 2012). Similarly, when the FDA announced its rule requiring "mandatory pasteurization" of milk products intended for human consumption, it titled the announcement "Requirements Affecting *Raw* Milk for Human Consumption In Interstate Commerce." FDA, Requirements Affecting Raw Milk for Human Consumption in Interstate Commerce, 52 Fed. Reg. 29509-02, 29509, 1987 WL 138767 (Aug. 10, 1987) (emphasis added). Courts also routinely use the two words as synonyms. *See, e.g.*, *United States v. Allgyer*, No. 11-02651, 2012 WL 6645544, at *1 (E.D. Pa. Dec. 20, 2012) (discussing the "the unlawful sale of unpasteurized ('raw') milk across state lines").

(2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (quoting *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002)).

"[W]here determination of a plaintiff's claim would require a court to decide an issue committed to the FDA's expertise without a clear indication of how FDA would view the issue, courts of this district have repeatedly found that dismissal or stay under the primary jurisdiction doctrine is appropriate." *Hood v. Wholesoy & Co.*, No. 12-5550, 2013 WL 3553979, at *5 (N.D. Cal. July 12, 2013) (citing, *e.g.*, *Astiana v. Hain Celestial Grp., Inc.*, 905 F. Supp. 2d 1013, 1016 (N.D. Cal. 2012); *Ivie v. Kraft Foods Global, Inc.*, No. 12-2554, 2013 WL 685372, at *7 (N.D. Cal. Feb. 25, 2013)); *see also Reese v. Odwalla*, --- F. Supp. 2d ----, 2014 WL 1244940, at *4-5 (N.D. Cal. 2014). Here, each of the *Syntek* factors weighs in favor of dismissal of Plaintiffs' claims.

First, the issue of whether and to what extent a food manufacturer may make claims such as "Unpasteurized," "100% Raw," or "Raw and Organic" on a product label is within the FDA's jurisdiction. *Hood*, 2013 WL 3553979, at *5 ("The FDA has regulatory authority over food labeling."); 21 C.F.R. § 10.25(b) ("FDA has primary jurisdiction to make the initial determination on issues within its statutory mandate").

Second, the FDA has used its authority to promulgate and enforce complex and comprehensive regulatory schemes governing food and beverage labeling, including specific regulations on juice labeling, as well as regulations on processes for reducing pathogens in juice such as pasteurization and HPP. *See, e.g.*, 21 C.F.R. § 101.17(g) (requiring warning label for "[j]uices that have not been specifically processed to prevent, reduce, or eliminate the presence of pathogens"); 21 C.F.R. §§ 120.1-120.25 (regulating juice processing); *cf. Reese*, 2014 WL 1244940, at *4-5 (primary jurisdiction doctrine applied where "the FDA's action clearly indicates that the agency is exercising its authority in this area").

Third, consistent administration of the complex federal regulatory scheme governing product labeling — including labeling of juices based on the treatment that such juices have undergone —

requires the expertise and considered judgment of the FDA. *See Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1178 (9th Cir. 2012) (admonishing that courts "must keep in mind that we lack the FDA's expertise in guarding against deception in the context of [food and beverage] labeling"); *Fraker v. KFC Corp.*, No. 06-1284, 2007 WL 1296571, at *4 (S.D. Cal. Apr. 30, 2007) ("To overlay the state law tort system over the FDCA would significantly increase the burdens on the FDA to ensure uniform enforcement of its administrative duties.").

Hain Celestial believes that the FDA's position on pasteurization is settled, *i.e.*, HPP is *not* pasteurization because it does not use heat to control pathogens (and, thus, Plaintiff's claims are preempted because the juices are properly labeled as "raw" and "unpasteurized"). *See supra* pp. 15-17. But to the extent the Court disagrees and concludes the FDA "has not set a uniform enforcement standard" in this regard, it should defer to the FDA's expertise in food safety and labeling issues. *See Hood*, 2013 WL 3553979, at *5 (primary jurisdiction doctrine properly invoked where "the FDA's position is not settled"); *Haggag v. Welch Foods, Inc.*, No. 13-341, 2014 WL 1246299, at *5-6 (C.D. Cal. Mar. 24, 2014) (invoking doctrine where FDA had not established a precise definition for implied health claims despite regulating extensively in the area). In the absence of clear FDA authority, resolving Plaintiffs' claims would "require the Court to decide an issue committed to the FDA's expertise without a clear indication of how FDA would view the issue." *Id.*; *see also Clark*, 523 F.3d at 1114 (primary jurisdiction doctrine applies where plaintiff's claims "implicate[] technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry"); *Taradejna v. Gen. Mills, Inc.*, 909 F. Supp. 2d 1128, 1135 (D. Minn. 2012) (emphasizing the importance of "ensur[ing] national uniformity in labeling, utilizing the Agency's special expertise in this regard").

A recent decision from the Central District of California is instructive. In *Watkins v. Vital Pharmaceuticals, Inc.*, the plaintiffs claimed that the label "ZERO IMPACT" misled consumers as to the products' nutritional content, because they did, in fact, have a dietary impact. No. 12-09374, 2013 WL 5972174, at *4 (C.D. Cal. Nov. 7, 2013). Noting the absence of "any FDA rule, regulation, or guidance document discussing how the claim 'ZERO IMPACT' or the word 'impact' can or should be used to describe a food product's nutritional content," the Court held that a judicial "determination on whether the term is misleading risk[ed] 'undermining, through private litigation, the FDA's considered judgments'" and dismissed the plaintiff's claim. *Id.* (quoting *Pom Wonderful*, 679 F.3d at 1178). Plaintiffs here make similar claims, alleging, for example, that a manufacturer cannot describe a juice as "raw" — even though it has never been treated with heat — unless the beverage contains *all* of the same "vitamins, nutrients, live enzymes, nutritional value, and health benefits" as it did before it was treated with pressure. *See* FAC ¶ 4, 26. To the extent this Court believes the FDA has not yet provided sufficient guidance on the meaning of the terms "unpasteurized" or "raw" — including guidance on whether use of such terms suggests that a product has not been subject to a process affecting its "vitamins, nutrients, live enzymes, nutritional value, and health benefits" in any way — the Court should similarly defer to the FDA to make this determination in the first instance.

IV. The Warranty and Unjust Enrichment Claims Must Be Dismissed.

A. The Complaint fails to state a claim under the Magnuson-Moss Warranty Act.

Plaintiffs fails to state a claim for breach of express warranty under the Magnuson-Moss Warranty Act (MMWA). First, "the MMWA is expressly 'inapplicable to any written warranty the making or content of which is otherwise governed by Federal law.'" *Hairston*, 2012 WL 1893818, at *5 (quoting 15 U.S.C. § 2311(d)). Here, as explained above, the FDCA and FDA regulations and guidance govern the product labeling challenged by Plaintiffs. The Magnuson-Moss claim must, therefore, be dismissed. *Id.*; *see also Viggiano*, 944 F. Supp. 2d at 897 (dismissing MMWA claim because "the FDCA, and the regulations promulgated thereunder, govern food labeling requirements"). Second, to constitute a written warranty under the Magnuson-Moss Act, the product must contain language that specifically identifies the duration of the warranty and a specified level of performance. 15 U.S.C. § 2301(6)(A). That requirement has not been met here. The statements challenged by Plaintiffs are 'product descriptions' rather than promises that [the products are] defect-free, or guarantees of specific performance levels." *Hairston*, 2012 WL 1893818, at *6 (phrase "all natural with vitamins" and names of Lifewater flavors were not "written warranties" within the meaning of the MMWA).[10] Third, even if the challenged statements could somehow be construed as promises or guarantees, they plainly do not "specify a level of performance over a specified period of time" and, thus, cannot support a claim under the MMWA. *Id.*; *Viggiano*, 944 F. Supp. 2d at 898 n.45; *Kelley v. Microsoft Corp.*, No. 07-475, 2007 WL 2600841, at *5 (W.D. Wash. Sept. 10, 2007) ("Windows Vista Capable" sticker was not a written warranty under the MMWA because it "contain[ed] no temporal element").[11]

B. The Complaint fails to state a claim for breach of express warranty.

"To state a claim for breach of express warranty under California law, a plaintiff must allege (1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury." *Nabors v. Google, Inc.*, No. 10-3897, 2011 WL 3861893 at*4 (N.D. Cal. Aug. 30, 2011). Here, Plaintiffs allege that the defendants expressly warranted that "the Juice Products contained the vitamins, nutrients, live enzymes, nutritional value, and health benefits that are eliminated by pasteurization or cooking." FAC ¶¶ 69.

Plaintiffs' claim fails as a matter of law because it is preempted. *Pardini v. Unilever U.S., Inc.*, --- F. Supp. 2d ----, 2013 WL 3456872, at *3-5, 9 (N.D. Cal. 2013) (warranty claims preempted because representations complied with FDA regulations). Further, a plaintiff cannot state a breach of warranty claim on the basis of their own idiosyncratic interpretation of a factually true statement. *See Viggiano*, 944 F. Supp. 2d at 893-94 (dismissing warranty claim because challenged statement "accurately describe[d] the product"); *Wolph v. Acer Am. Corp.*, No. 09-1314, 2009 WL 2969467, at

[10] *See also Kosta v. Del Monte Corp.*, No. 12-1722, 2013 WL 2147413, at *13 (N.D. Cal. May 15, 2013) ("claims regarding a product's nutrient contents constitute general product descriptions," and are not written warranties under the MMWA); *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1004 (N.D. Cal. 2012) ("A product description does not constitute a written warranty under the MMWA.").

[11] Courts in this District have also held that "[i]n order to bring a cognizable claim under the MMWA, the amount in controversy of an individual claim must be greater or equal to $25, and the number of named plaintiffs must be more than one hundred." *Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947, 965-66 (N.D. Cal. 2013) (citing 15 U.S.C. § 2310(d)(3)); *see also Khasin v. Hershey Co.*, No. 12-1862, 2012 WL 5471153, at *8 (N.D. Cal. Nov. 9, 2012). Here, there are only two named plaintiffs, and they fail to allege that they spent at least $25 on the challenged products. *See* FAC ¶¶ 12, 13 (alleging Plaintiffs each purchased one bottle of juice for $9.99).

*2 (N.D. Cal. Sept. 14, 2009) (dismissing warranty claim based on plaintiff's subjective interpretation of labeling statements).

C. Plaintiffs fail to state a claim for breach of the implied warranty of merchantability.

A "defendant['s] liability for an implied warranty does not depend upon any specific conduct or promise on [its] part, but instead turns on whether the[] product is merchantable under the code." *Hauter v. Zogarts*, 14 Cal. 3d 104, 117 (1975). California does not "impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality." *Viggiano*, 944 F. Supp. 2d at 896. Accordingly, a plaintiff who claims a breach of the implied warranty of merchantability must allege that the product "did not possess even the most basic degree of fitness for ordinary use.'" *Id.*; *see also Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009). This is true even where, as here, a product is "labeled with specific adjectives"; simply put, "that description does not change the ordinary purpose that [the product] is used for." *Rossi v. Whirlpool Corp.*, No. 12-125, 2013 WL 5781673, at *7 (E.D. Cal. Oct. 25, 2013).

Here, as in *Viggiano* and *Rossi*, Plaintiffs "do[] not allege that [the juice] lacks 'even the most basic degrees of fitness for ordinary use'; nor do[they] allege that the drink[s] [are] not suitable for use as a [juice]. Rather, [they] appear[] to misapprehend the nature of implied warranty claims; [they] plead[] only that [Hain Celestial] has breached implied warranties by representing that the" juices are "raw" and "unpasteurized." *Viggiano*, 944 F. Supp. 2d at 896; *see also Rossi*, 2013 WL 5781673, at *7 (plaintiffs failed to state a claim as to allegedly falsely advertised refrigerator where they did not "allege that the products failed to refrigerate"). In short, while Plaintiffs allege the juices did not "precisely fulfill [their] expectation[s]," they do *not* "allege any facts suggesting the [juice] is not merchantable or fit for use as a [juice]; [they] ha[ve] not, for example, alleged that the beverage was not drinkable, that it was contaminated or contained foreign objects, etc." *Viggiano*, 944 F. Supp. 2d at 896; *see* FAC ¶ 4 (alleging that the juice products are "run-of-the-mill pasteurized or cooked juices").[12]

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[12] Plaintiffs do not indicate whether their implied warranty claim is brought pursuant to statute or common law. To the extent it is asserted under the Song-Beverly Consumer Warranty Act, it fails for the additional reason that the Act does not apply to "consumables," which the BluePrint drinks

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D. The Complaint fails to state a claim for unjust enrichment / common law restitution.

Plaintiffs also purport to allege a cause of action for "Unjust Enrichment / Common Law Restitution." FAC at 32. Plaintiffs' fourth cause of action fails for at least three reasons. First, it fails to state a claim because California law does not recognize a cause of action for unjust enrichment. *Pirozzi v. Apple, Inc.*, --- F. Supp. 2d ----, 2013 WL 4029067, at *9 (N.D. Cal. 2013); *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1194 (C.D. Cal. 2010). Second, Plaintiffs fail to allege facts to support a claim that Hain Celestial was "unjustly enriched." Their theory of unjust enrichment is that the BluePrint drinks were misledingly advertised as "raw" and "unpasteurized." But Hain Celestial has fully complied with the applicable FDA regulations and guidance and, in any event, has truthfully represented the nature of the products, *i.e.*, they are not treated with heat and are thus "raw" and "unpasteurized." Plaintiffs cannot show, therefore, that Hain Celestial has been "unjustly enriched" by retaining the monies paid by the putative class to purchase the products. *See, e.g.*, *Marilao v. McDonald's Corp.*, 632 F. Supp. 2d 1008, 1013 (S.D. Cal. 2009) (dismissing claim for unjust enrichment premised on violation of UCL where UCL claim was dismissed and, thus, "Plaintiff allege[d] no wrongful conduct" by defendant); *McKinnis v. Kellogg USA*, No. 07-2611, 2007 WL 4766060, at *6 (C.D. Cal. Sept. 19, 2007) (dismissing unjust enrichment claim because "Plaintiffs have failed to state any substantive claim" that packaging would mislead a reasonable consumer). Finally, Plaintiffs' claim should be dismissed as duplicative; "restitution is already a remedy for [Plaintiffs'] claims under the UCL." *Pirozzi*, 2013 WL 4029067, at *9.

V. Plaintiffs Also Lack Standing to Assert Certain Claims.

Article III requires a plaintiff to show "injury in fact" to have standing in federal court. In addition to Article III, "the UCL, FAL, and CLRA all require Plaintiffs to demonstrate standing." *Kane v. Chobani, Inc.*, No. 12-2425, 2013 WL 5289253, at *5 (N.D. Cal. Sept. 19, 2013).

A. Plaintiffs lack standing to seek injunctive relief.

Pursuant to Article III, "a plaintiff does not have standing to seek prospective injunctive

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indisputably are. Cal. Civ. Code § 1791(a); *Bruton v. Gerber Prods. Co.*, --- F. Supp. 2d ----, 2013 WL 4833413, at *22 (N.D. Cal. 2013).

relief against a manufacturer or seller engaging in false or misleading advertising unless there is a likelihood that the plaintiff would suffer future harm from the defendant's conduct." *Mason v. Nature's Innovation, Inc.*, No. 12-3019, 2013 WL 1969957, at *4 (S.D. Cal. May 13, 2013). Here, Plaintiffs now know that the beverages are treated with HPP. *See* FAC ¶¶ 1, 4. Accordingly, there is not a "sufficient likelihood that [they] will again be wronged in a similar way," *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011), *i.e.*, they are not "realistically threatened by a *repetition* of the violation." *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 626 (N.D. Cal. 2011).

The *Wang* case is instructive. The plaintiff in that case sought injunctive relief on the ground that the defendant continued to disseminate the allegedly misleading advertisements. *Id.* at 626. But the court held that he lacked standing to do so because, being aware of the allegedly misleading nature of those advertisements, there was "no danger" that the plaintiff would again pay "an inflated price for the product based on [the] alleged misrepresentations." *Id.* at 626-27. Likewise, here, there is "no danger" that Plaintiffs would be duped into purchasing BluePrint beverages (or paying a premium for them) based on the challenged phrases because they now know they are treated with HPP. *See id.*; *see also Campion v. Old Republic Home Protection Co.*, 861 F. Supp. 2d 1139, 1149-50 (S.D. Cal. 2012); *Castagnola v. Hewlett-Packard Co.*, No. 11-5772, 2012 WL 2159385, at *5 (N.D. Cal. June 13, 2012). And because they are not "entitled to seek injunctive relief," Plaintiffs "may not represent a class seeking that relief." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). The Court should therefore dismiss the claim for injunctive relief.

B. Plaintiffs lack standing to assert claims as to products they never purchased.

Plaintiff Alamilla purchased only a single bottle of "Red Juice," (FAC ¶ 12) and Plaintiff King bought one bottle of "Gold Juice" (*id.* ¶ 13), yet they purport to assert claims against *all* BluePrintJuice and BluePrintCleanse products. *See id.* ¶ 1. They lack standing to assert claims related to products they did not purchase because "there can be no requisite *pecuniary* injury where [a] plaintiff did not [him]self purchase the product at issue." *Ivie*, 2013 WL 685372, at *5.[13]

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[13] *See also Larsen v. Trader Joe's Co.*, No. 11-5188, 2012 WL 5458396, at *5 (N.D. Cal. June 14, 2012); *Granfield v. NVIDIA Corp.*, No. 11-5403, 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2012) ("[W]hen a plaintiff asserts claims based both on products that she purchased and products that she

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Nor do Plaintiffs even attempt to show that the products are "substantially similar." *See Wilson v. Frito-Lay N. Am. Inc.*, --- F. Supp. 2d ----, 2013 WL 5777920, at *4 (N.D. Cal. 2013). In fact, they concede at least one of the BluePrintJuice labels is materially different than the others. *See* FAC at 1 n.2 (alleging "the 'White Juice' does not represent that it is 'Unpasteurized'"). And their allegations about the Cleanse products — which neither Plaintiff ever purchased — make clear that they are very different products from the Juices, and that the purchase of these products involves different factors and considerations. Unlike the Juice products, "BluePrintCleanse is a daily cleanse program that replaces a consumer's meals with six juices per day." FAC ¶ 35. Further, in contrast to the BluePrintJuice products, Plaintiffs allege that "Defendants predominantly market, advertise, and sell their Cleanses to consumers directly through their website." *Id.* ¶ 36. Thus, according to Plaintiffs — who wouldn't actually know, since they've never bought the products — "consumers rely on the representations made on the website in making their purchase decision rather than the representations contained on the products' labels." *Id.* Plaintiffs therefore lack standing to assert claims as to these products even if this Court applies the permissive "substantial similarity" test for standing.

CONCLUSION

For the foregoing reasons, Hain Celestial respectfully requests that the Court dismiss Plaintiffs' First Amended Complaint in its entirety. Because the complaint has already been amended once, and the challenged statements are not actionable as a matter of law, granting leave to amend would be futile. Accordingly, Plaintiffs' First Amended Complaint should be dismissed with prejudice.

Dated: April 8, 2014

JENNER & BLOCK LLP

/s Kenneth K. Lee
By: Kenneth K. Lee

Attorneys for The Hain Celestial Group, Inc.

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did not purchase, claims relating to products not purchased must be dismissed for lack of standing."); *Leonhart v. Nature's Path Foods, Inc.*, No. 13-492, 2014 WL 1338161, at *4 (N.D. Cal. Mar. 31, 2014).